United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1569

To be argued by
IRVING ANOLIK, ESQ.
and VICTOR L. BRIZEL, ESQ.

74-1569

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-1569

UNITED STATES OF AMERICA,

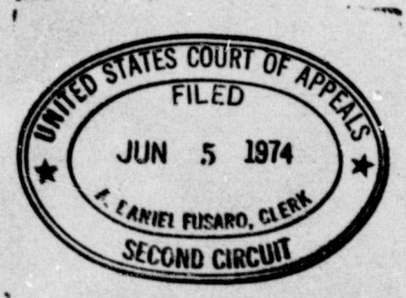
Appellee,

-against-

MICHAEL ALLEN FALLEY

Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



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PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Marvin E. Frankel, J.) rendered May 1st, 1974, convicting Appellant MICHAEL ALLEN FALLEY in the one count charged of unlawfully, intentionally and knowingly distributing or possessing with intent to distribute some three thousand grams of Hashish-like substance containing marijuana, in violation of Tile 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). The appellant was sentenced to serve a two year term of imprisonment to be followed by three years of special parole. The appellant is presently incarcerated in the Federal Penitentiary, Danbury, Connecticut.

Execution of sentence had been stayed by the trial judge until May 6, 1974. On May 3, 1974, a panel of this court comprising The Honorable William Hughes Mulligan, The Honorable Sterry R. Waterman and The Honorable Henry J. Friendly, pursuant to a motion filed by counsel for the appellant authorized the appellant to remain at liberty upon the posting of an additional $15,000.00 cash bail in addition to the $15,000.00 cash bail already posted and the $15,000.00 cash posted in another case in the Eastern District of New York. The appellant was also directed to turn in his passport to the court.

There was submitted a motion for reconsideration which pointed out that the appellant's passport was held in escrow by an attorney who had been counsel in the appellant's other case which resulted in a conviction before Judge Weinstein that was reversed by this court in late 1973. The reconsideration motion which also asked for appellant's continuance on $15,000.00 bail was denied in an order of this court dated May 13, 1974.

In the court on May 3, 1974, when it set the new bail conditions which would have permitted the appellant to remain at liberty pending determination of this appeal if he complied there were set early dates for filing of this brief and the hearing of this appeal. The appellant surrendered and engaged private counsel as Judge Friendly had commented upon on the May 3rd hearing. Counsel herein began work on this matter but was directed by the Appellant and his wife not to hand in any brief as Mr. Anolik had been engaged. Counsel herein assigned under the Criminal Justice Act believed the filing of a motion by Mr. Anolik for an extension would be granted as the appellant was no longer free on bail, the application for continuance of which had resulted in the case being heard by a panel which set brief and hearing dates. Mr. Anolik's motion dated May 17, 1974, was referred to The Honorable Irving R. Kaufman, Chief Judge and decided in an order dated May 29, 1974. The Clerk's office telephoned counsel who had been actually engaged during the day in another court proceedings and informed me that the brief was required on May 31, 1974. He also filed his own motion after speaking with the Clerk on May 30, 1974, and

waited until 5:30 p.m., for a decision. Thereafter, counsel went to the Chambers of the Chief Judge and was informed to telephone in the morning of the 31st. On May 31, 1974, counsel who had to appear in three other courts on that day and had not made arrangements for postponements because he did not know he would be required to write a brief in this case informed Judge Kaufman's Clerks that compliance would be impossible. In a subsequent appearance at the Chief Judge's Chambers on May 31, 1974, a Friday, the counsel preparing this brief informed Judge Kaufman's Chambers that he would work all day Saturday and Sunday and have this brief typed up on Monday. He further indicated that the short period of time available and the fact of the weekend would limit seriously the ability to do adequate research or to edit and make more concise the first draft herein. It is the hope of counsel that the court will permit him to file this brief as per the motion filed herewith and further that the court after hearing this case will permit a supplemental brief to be filed if necessary herein.

Mr. Irving Anolik, Esquire, the privately

retained counsel mentioned above, has researched this case and prepared a brief. It is hoped the court will permit the filing of that brief as an amicus curiae, or as of counsel and will incorporate all the points contained therein in this brief. It is further requested that Mr. Anolik be permitted to argue this case before the court.

The complaint against the appellant who was arrested on October 4, 1973, was adjourned on November 16, 1973. The government informed the Magistrate Hearing would be held on November 19, 1973, on which date the government indicated to counsel the case would be dismissed if the defense insisted upon a preliminary hearing and the appellant would be promptly indicted. Magistrate Hartenstein dismissed the case on that date. The appellant was indicted on this indictment before the court.

Upon the defendant's indictment the case was assigned to The Honorable Marvin E. Frankel, United District Judge. Pre-trial motions were made asking for inspection of Grand Jury minutes, dismissal of the indictment, a preliminary

hearing, employment of the private investigator at government expense, a bill of particulars and other requests.

Trial was held on March 18, 19 and 20, 1974, with sentencing on May 1, 1974.

The appellant by the last day set for motions in the court below submitted notice to the court that private counsel had been engaged. The attorney, Judge Raphael Koenig submitted an affidavit about a week before trial that he was actually engaged in another case and requested a brief adjournment. The trial judge refused such request and directed assigned counsel to proceed with the trial. The appellant elected to try his own case with the assigned counsel being available to advise him and to help him with subpoenas and otherwise. (2)*

*Numerals in parentheses refer to page numbers of the transcript of the trial.

STATEMENT OF FACTS

The one count indictment charging that on October 4, 1973, the appellant distributed and possessed with the intent to distribute six pounds of hasish was attempted to be proven by the testimony of one David Stolzenberg, a governemnt informer who had been a co-defendant with Mr. Falley in the Eastern District case mentioned above. His conviction for that crime was affirmed though Mr. Falley's conviction was reversed. Mr. Stolzenberg alleges Mr. Falley telephoned him on several occasions in an effort to find a buyer for the hashish which it is claimed Mr. Falley came into possession of. Mr. Falley, according to Mr. Figueroa, the Assistant United States Attorney, who tried the case, did not know that David Stolzenberg was cooperating with the government as a result of a previous arrest. (7). Mr. Stonzenberg contacted Special Agents of the Bureau of Narcotics, who were present at the last of these telephone calls and recorded the conversation of Mr. Falley. It is claimed that the appellant agreed to meet Mr. Stolzenberg in the vicinity of Grand Central Station with a plan to hand him the key to

a public coin operated locker which locker would contain the narcotics charged in this case. After obtaining the narcotics, Mr. Stolzenberg would come back and pay Mr. Falley.

The other witnesses for the government in addition to the chemist who analyzed the contraband were agents of the Drug Enforcement Admninistration (D.E.A.). None of these agents who were called by the government or called by the defense ever saw Mr. Falley hand the said key to Mr. Stolzenberg. The agents did go to the locker with Stolzenberg and found hashish, but no one ever saw who put the hashish in the locker. The agents who saw Stolzenberg searched before meeting Falley did not search the boots or inside garments of David Stolzenberg to see if a key could have been hidden on Stolzenberg's person and produced as coming from Falley.

The key to the locker represented by Mr. Cooney, an Assistant United States Attorney, to be in government possession turned out not to have been recovered.

The key which had been requested for examination in the defendant's bill of particulars and which the Assistant United States Attorney then handling the case, Mr. Cooney indicated in his letter to counsel which was given also to Judge Frankel, said the key recovered would be given to counsel for inspection. The testimony of the government witnesses at the trial was different. That the key was not in the possession of te government and had been put into the locker to open it and left there.

The first witness for the government David Stolzenberg testified to receiving the first telephone call from Mr. Falley on October 2, 1973 (13). The witness testified the appellant claimed to have five to six pounds of hashish for sale at $500.00 per pound; he asked the witness Stolzenberg if he could sell it for him (14). The witness contacted Agent Fred Boff of the Drug Enforcement Administration (14), whose agency the witness decided to cooperate with after his arrest in September, 1973 (15). Mr. Falley is alleged to have called back on October 3rd, the following day asking if a buyer had been found (16). The witness claims to have

said he had a buyer, a friend from Philadelphia and it was agreed that the parties would meet on Thursady, October 4, 1974, in the morning (16). Agents of the Drug Enforcement Administration were notified to be present on the following morning. Mr. Falley called again at 9:30 on October 4 (17); the price and quantity were discussed and the witness claims Mr. Falley said he had already put the hashish in the locker in Grand Central Station; he would give the key to the witness. The informant notified Agent, Fred Boff and Agent Ronny Jordison (18) who came into his house. Mr. Falley called back and the agents attempted to hook up a recording (19). It was hooked up, but it did keep falling off. The meeting was arranged for the Pan American Building entrance where it is claimed Falley said he would give Stolzenberg the locker key and Stolzenberg would take the key, check the merchandise and bring back the cash (1920).

Mr. Stolzenberg then left his apartment with agents Boff and Jordison and other agents and went to the area of Park Avenue and 41st Street, where he was searched and proceeded toward Vanderbilt and 44th, the Pan Am Building (20).

He walked with Agent Jordison toward the entrance and saw Michael Falley. Jordison was supposed to be the buyer from Philadelphia. Appellant said "Hello, goodbye, see you around the corner" to Jordison. Jordison walked out of sight and Falley is then alleged by Stolzenberg to have handed him a locker key. This is the key that never was recovered or marked in evidence by the government which had claimed possession of it prior to trial.

After claiming to have received the key, the witness says he handed the key to agent Jordison, walked into the Pan Am Building and over to Grand Central Station looking for the proper locker that matched the key number.

The locker was found and the witness testified there were two boxes and in each box was a plastic bag with Nepalese Hashish (23). The witness identified the exhibits as being those in the locker.

The witness testified to consenting to having a recording made of his last conversation with Mr. Falley.

He further testified that a transcript made of the conversation was accurate (25-26). The transcript and tapes were permitted into evidence. The witness testified to having known the appellant for between eleven and twelve years (32). David Stolzenberg stayed at the appellant's home with his wife on many occasions. The United States Attorney asked the witness, his own witness, about his criminal record and his witness indicated he was convicted for conspiracy to smuggle hashish in the Eastern District and conspiracy to sell cocaine and as recently as January of 1974, for possession of maraijuana(32).

Cross examination of David Stolzenberg conducted by the appellant got the witness to admit being a heroin addict (33). The witness admitted he had been at a Methadone center. The witness further stated when asked if at this time are you free from drug use (35), "not completely, no" (35). The witness stated that at this time he was using Pot. David Stolzenberg said he uses Primatene for his asthma and occasionally takes Dilantin for epileptic seizures (36). He further admitted in 1972 he was taking barbituates and cracked his head open on the floor of a courtroom in Brooklyn because of an epileptic seizure.

The witness said that his epileptic seizures do cause a loss of approximately 24 hours memory (37). The witness further testified to a motorcycle accident in Florida causing him a head injury (38). His friends called him "Opso, Jr." which means observation case (39). The witness was asked on cross-examination as he had been on direct about his prior record (43-46); he said he was convicted of conspiracy to smuggle hashish in April of 1973 in the Eastern District. He was arrested in September of 1973 in Manhattan, pleaded to conspiracy to sell cocaine. The witness testified about cooperation with the Drug Enforcement Administration and doing something for himself instead of against himself (47). He knew that the second conviction meant he was facing thirty years ih jail (47) and the witness also told about the arrest in 1964 for grand larceny auto and in 1962 for postal embezzlement (49). The witness decided to cooperate with the Federal Government on September 7, 1973.

The witness testified about the recorded conversation and the lapses in the recording. He claims that it was a complete tape because he heard it on the morning of

October 4th. He said the actual word hashish was not used (56-57). Though cooperating at the time with the Federal Government, neither Mr. Stolzenberg nor the defendant used the word hashish.

The number on the particular locker key was 6235 (68). The key was described and the witness testified to the appellant handing him a key (69). The appellant's eighteen month old child was there according to the witness (71). Stolzenberg says again here that he gave the key to the Federal Agent, went down and opened the locker (71) and Stolzenberg said it was the only locker key he had on him in his possession (72). Stolzenberg admitted he had in the past left things in Falley's residence (72-73). He said when asked if he remembered asking Falley to bring him his coat that he did remember the corduroy coat (73). He had stayed at the Falley house in Poughkeepsie. There was a disagreement between the parties and Stolzenberg walked toward New York and Falley passed him by on the highway. The witness testified that he spent about 100 hours with the Federal Authorities as an informant (77). The witness testified that he knew what was taken from the locker to be Nepalese Hashish.

He had been arrested in April of 1972 for importing Hashish from India and had previously been arrested in Pakistan for possession of hashish. He said that he is well acquainted with Hashish (81). The witness again said that the narcotics in this case are from Northern India or Nepal (82).

The Assistant United States Attorney on redirect examination asked the witness about his negotiations with hashish in the past (85) which are not involved in this indictment. He asked if when speaking on the phone concerning hashish negotiations, if he used the word hashish on the phone (85-86). The defense objected to this and it was overruled. There was other questioning of the witness on re-cross and redirect and then the witness left stand.

The next witness for the government was Agent Ronald Jordison of the Drug Enforcement Administration. As prearranged, he and Agent Boff arrived at Mr. Stolzenberg's apartment at approximately 10:00 a.m., on October 4th when Mr. Stolzenberg received a telephone call. Agent Boff connected a cassette tape recorder for the purpose of recording

a telephone conversation (95). After the telephone conversation, the DEA Agents and Stolzenberg made their plans to meet Falley for the purpose of doing a deal concerning hashish (96). They went toward the destination of the Pan Am Building, searched Stolzenberg, went to the Pan Am Building, met Mr. Falley and the Agent withdrew at the request of Mr. Falley. DEA Agent Jordison walked around the corner and next saw Stolzenberg approaching with a key in his hand to Locker No. 6235 in Grand Central Station. They went to the locker, seized the evidence and signaled another agent.

On cross-examination the witness testified about various details that occurred and he said he did not hear the word hashish mentioned in the tape (116).

Agent Jordison said that David Stolzenberg was wearing brown boots and he did not take the boots off to search him (119). When asked if it was possible for Mr. Stolzenberg to have a key secretly hidden in his boots, the agent replied he has no awareness of that. He also testified that he did not do a thorough search on Stolzenberg (118).

The witness, Agent Jordison was again asked on cross-examination by the appellant if the agent looked in Mr. Stolzenberg's boots for a key and he answered that he didn't know, he was looking for a key (120). The agent testified that nothing was done about seizing the key to the locker which was the same key that the Assistant United States Attorney Mr. Cooney had indicated in his letter was in government possession (131-132). The agent further did not know how the hashish got into the locker.

On redirect examination by the government, the witness was asked about prior under-cover activities. He said he would not use the word hashish in a telephone conversation.

The next government witness was Agent Joseph Barrett, also of the Drug Enforcement Administration (142). He met on October 4, 1973, Agents Boff, Jordison & Dowd in the vicinity of Peter Cooper Road where Solzenberg lived. Agent Barrett and Agent Dowd remained outside and after

conversation with other agents went to the vicinity of the Pan Am Building. He saw Agent Jordison shake hands with Mr. Falley and testified it appeared Mr. Falley motioned for Agent Jordison to leave (145). He saw Stolzenberg and Falley talk and said it appeared that something was passed to Mr. Stolzenberg. The court overruled the defense objection to the statement that it appeared that something passed to Stolzenberg and the United States Attorney then asked after this apparent transfer, what happened (145). The witness then saw Mr. Stolzenberg depart in the same direction as Agent Jordison had. He then lost sight of Stolzenberg. Ten seconds later, he saw Agent Jordison and Stolzenberg meeting. Mr. Falley was at the scene for about ten or fifteen minutes and was in conversation with an unidentified female (147). About ten minutes later he saw Agents Dowd, Anderson and Noone arresting Michael Allen Falley.

On cross-examination, Agent Barrett said that he saw Mr. Falley seated with his baby. He walked into the building up steps to another level and from that upper level saw Falley put in Stolzenberg's right hand what had been in the

appellant's right hand. When asked if it could have been a cigarette, he answered, "Yes, sir" (154). The witness when asked if anybody saw him hand the key to Stolzenberg, answered -I believe not sir. I don't know (157).

After the witness left the stand, Mr. Falley moved for dismissal of the indictment on the grounds that David Stolzenberg,the government's one major witness stated he did not appear before the Grand Jury and no other agent had come forward stating that he saw any transfer of a key between Mr. Falley and Mr. Stolzenberg. The court denied this motion (165).

The next government witness was Agent John Dowd of the Drug Enforcement Administration who testified that on October 4, with Agent Barrett he proceeded from Peter Cooper Village to the vicinity of Grand Central Station, saw Mr. FAlley seated on the steps of the entrance of the Pan Am Building and subsequently saw Agent Jordison with David Stolzenberg meet the appellant. He moved to another location and saw Agent Jordison and Mr. Stolzenberg go into Grand Central Station where they approached the locker (167-

168), and saw the hashish removed from the locker.

On cross-examination, Agent Dowd was asked a variety of questions by Mr. Falley. He said he did not see any transfer between Mr. Stolzenberg and Mr. Falley (176). Agent Dowd further testified that the basis of his swearing to the complaint was that he was told that Agent Barrett saw Mr. Falley meeting with the informant and with Agent Jordison and based on the fact that Agent Jordison did receive the key and did go to the locker and did find the hashish in the locker. (79). The witness who swore to the complaint was asked about the statement which refers to the reliable confidential informant. He was asked if Mr. Stolzenberg had given information on any other defendants at other trials prior to this case and the United States Attorney'objection was sustained to that question.

The witness Dowd does not remember what happened to the locker key which he saw inserted in the locker where the hashish had been stored. The court stated on page 186 the questions concerning the events of the

arrest on the basis of what he had been told are not admissible and he wanted the ruling followed (186).

The government called a forensic chemist, Jeffrey Webber to the stand (186). He testified on direct examination that the substances in the three plastic bags were found to contain hashish which is a form of marijuana. On cross-examination by the appellant the chemist when asked where the evidence he examined came from, said he did not know. He said it contained a tetrahydrocannabinol substance present in marijuana (189). The chemist said it also contained the resin of the plant Cannibis Sativa L (189).

The government rested its case and Mr. Falley made a motion for a Judgment of Acquittal and dismissal pursuant to Rule 29. The court denied the motion (193).

The defense called as its first witness Agent Frederic Boff of the Drug Enforcement Administration. The agent testified that the informant Stolzenberg had told him that he had received a telephone call from the appellant, Michael

Allen Falley for a narcotic transaction. Informant Stolzenberg was known by the number SC-130199(196-197). Agent Boff probably in conjunction with his supervisor and Agent Noone decided to put the tap on the informant's telephone (198). He went with Agent Jordison to Peter Cooper Village, the residence of Stolzenberg and attempted to put the recording device on the telephone which fell off a few times (200). Assistant United States Attorney asked no questions on cross-examination.

The appellant who was trying his own case, next called Agent Arthur Anderson of the Drug Enforcement Administration (207) and he testified that he knew David Stolzenberg the informant as he had previously questioned him on a charge of possession with intent to distribute cocaine. Agent Anderson was aware of another arrest of Stolzenberg, after which he began his cooperation with the authorities. Agent Anderson testified he was the arresting officer in one of Stolzenberg's cases and to his knowledge Stolzenberg has not yet been sentenced (214).

The witnesses subpoeaned by the appellant who

indicated that they would invoke their constitutional privileges against self incrimination were excused by the court. The defense did not insist upon their appearing and invoking the Fifth Amendment in front of the Jury when the court had already indicated it would not require them to make answers (216 et seq.). The witnesses excused were under indictment on other charges and were going to be questioned about the veracity of the government informer, David Stolzenberg.

Agent Bryan Noone of the Drug Enforcement Administration was the next witness called for the defense (226-226). He testified that on September 7, 1973 he arrested David Stolzenberg. Agent Noone, on October 4, 1973, was instructed to proceed to the Pan American Building at about 11:00 o'clock in the morning (231). He saw Agent Jordison enter the vicinity talking to a confidential informant of the office. He saw the appellant sitting with a girl and a child. (233). The witness testified that he knows David Stolzenberg and that he had arrested him for selling narcotics directly to himself.

Mr. FAlley then called as his next witness

Marcia Stolzenberg, the wife of the government's informant and principal witness, David Stolzenberg (239). She became separated from Mr. Stolzenberg on August 13, 1972. The appellant then produced a passport case with the initials D.S. on it, and asked the witness if she recognized this case. She also identified her husband's vaccination certificate.. It had the dates her husband had left the country and places where he had gone.(241-242). Mr. Falley next produced a coat and asked Mrs. Stolzenberg whose coat it was. She answered that her husband had bought a coat exactly like this, but that she had no way of knowing if it was this exact same coat. She further testified that her husband eventually denied having anything to do with Michael Falley's arrest, but subsequently, told her that he did (242-243). On cross-examination by the government, Mrs. Stolzenberg testified her husband, Mr. Stolzenberg and Mr. Falley were the best of friends.

The defense called Steve Wittels, the brother-in-law by marriage of the appellant (244). He testified that he worked for the Consolidated Edison Company for fifteen

years. He said the coat the appellant had in court was familiar looking. It looked like a coat that he tried on in his house. The witness said that the case the appellant had did not look familiar . As to the coat, on October 3, 1973, he tried it on. On October 4, 1974, the following morning, the appellant's brother-in-law drove the appellant and his child into New York and he said that as far as he could remember, there was a bag the appellant brought with him and something for the child to carry his things. He did not recognize several of the exhibits as being around Falley. On or about October 4, 1974, the witness said he did not know what Mr. Falley was carrying.

Janet S. Falley the wife of the appellant was called to the stand (250 et seq.). The witness testified that pursuant to a subpoena she obtained the coat the appellant had in court from the locker company at Grand Central Station. She had obtained the subpoena for the contents of a locker that was seized around October 4, 1973. She further testified that the coat she had brought to court was similar to the one worn by Mr. Stolzenberg, who had left it at the

Falley home. Stolzenberg had also left his passport case containing the vaccination certificate at the home of the Falleys. The court excluded from evidence the locker key, the coat and the case(258). On cross-examination, Mrs. Falley said she never saw her husband put the coat in the locker.

Mr. Falley then requested that David Stolzenberg be re-called to the stand to identify it The United States Attorney agreed to stipulate that the coat belonged to Mr. Stolzenberg.

In response to assigned counsel's statement that the defendant-appellant and not counsel was steering the defense and that counsel did not interview witnesses prior to testimony, Judge Frankel said as a personal expression that he had observed efforts of counsel and in a purely personal professional sense wished to extend appreciation to counsel for management of what is a particularly difficult and challenging task for a lawyer. The court further noted that it did not wish this in any way to affect any question Mr. Falley might wish to preserve about the court's denial of the appellant's

application to postpone the trial while he substituted retained counsel (265).

The appellant elected to try his own case. Counsel said he had advised Mr. Falley not to take the stand. There was discussion about the key which the Government now says it does not have possession of. The court indicated it was not treating Mr. Cooney's error in saying the Government had the key lightly. The court did not see the prejudice in Mr. Cooney's mistake though it did not approve of it.

The defendant appellant called as his next witness Sonja Falley She testified that she had an appointment with her son the appellant to have lunch at 12:00 on October 4, 1973, in midtown Manhattan.

After discussion with the court as contained in the record the defense rested. The defense counsel moved to dismiss the indictment on the ground of insufficient evicence before the Grand Jury as Mr. Stolzenberg did not testify. No one else claims to have seen Mr. Falley pass

the key to the locker to Mr. Stolzenberg. Mr. Figueroa indicated only Agent Jordison appeared before the Grand Jury. The court denied the motion (280).

Mr. FAlley made his own motion to dismiss for insufficient evidence before the Grand Jury and other grounds;the motion was denied (281).

Mr. Falley's summation appears on page 285. The government began its summation on page 297 of the minutes. The court began its charge on page 308 of the minutes. The court stated the key question to be whether Mr. Falley knowing and understanding what he was doing asked to deliver the marijuana in question to Mr. Stolzenberg for some agreed price and deliver a key to Mr. Stolzenberg of a locker in Grand Central Station understanding that Mr. Stolzenberg would take that contraband substance out of the locker and then pay for it if it turned out to be what was understood to be delivered after his inspection (315). The government, Mr. Falley and Counsel did not have any exceptions. The Jury deliberated and found the defendant guilty (324),

ARGUMENT

In view of the abbreviated period of preparation of this brief, by counsel, and the fact it is being written on a weekend, citations are lacking. The brief of privately engaged counsel which is also being submitted contains such material. If the court grants an opportunity for a supplemental brief before rendering decision, such will be filed if appropriate.

POINT ONE

DENIAL OF VARIOUS PRE-TRIAL MOTIONS INCLUDING THE FOLLOWING WAS HIGHLY PREJUDICIAL-DENIAL OF THE MOTION TO DISMISS THE INDICTMENT; DENIAL OF THE PRE-TRIAL MOTION TO EXAMINE THE NARCOTICS IN QUESTION, THE PROSECUTOR's PRE-TRIAL MISREPRESENTATION OF HAVING THE KEY, WHICH HE DID NOT HAVE WAS PREJUDICIAL; DENIAL OF DEFENDANT'S MOTION FOR A PRIVATE DETECTIVE WAS PREJUDICIAL; DENIAL OF A PRELIMINARY HEARING TOGETHER WITH A DISMISSAL FOLLOWED BY AN INDICTMENT WAS PREJUDICIAL, DENIAL OF THE PRE-TRIAL MOTION FOR AN EAVESDROPPING HEARING WAS PREJUDICIAL, AS WERE OTHER POINTS RAISED.

The indictment was insufficient as a matter of law. Only one government WITNESS testified before the Grand Jury and he did not see the key pass. His evidence was to a great extent hearsay. While many cases uphold indictments based on such, it is the contention herein that

the government's presentation was insufficient, especially since so many Drug Enforcement Agents were involved in this case and none saw the alleged exchange of possession of the narcotics. Mr. Stolzenberg in his testimony testified he had appeared before two Federal Grand Juries. In this case, however, he did not appear. If he had appeared before the Grand Jury he might have been questioned by individual Jurors about the fact that he , a long time friend of the appellant with a long record, awaiting sentence in another case, was the only one to see the alleged transfer of the key. The Jury might not have believed such witness even though the Jury at the trial seems to have done otherwise. It may be that the hearsay and remoteness of personal observations by the witness who did testify at the Grand Jury should require dismissal of the indictment.

It is interesting that the United States Attorney who presented this case to the Grand Jury believed the government had possession of the key to the locker containing the narcotics. Transfer of the key is the alleged transfer of the narcotics and the apparent misunderstanding of the prosecutor who presented the case to the Grand Jury

as evidenced by his letter to counsel and his response to defense motions indicate the Grand Jurors could have not possibly been made aware of the missing evidence. There was no evidence presented to the Grand Jury of Mr. Falley putting the narcotics in the locker. He was never seen by anyone at all in possession of narcotics.

The Court denied the pre-trial inspection of the Grand Jury Minutes which could have shown counsel in advance of the trial that the government had not presented key to the Grand Jury. If the Grand Jury had known of the complete lack of evidence of the government, it may well have refused to indict Mr. Falley on the basis of the hearsay evidence presented to it.

The prosecutor who presented the case to the Grand Jury said in point 6 of his affidavit in opposition to pre-trial motions as follows:

> "With respect to the requests in Paragraph Nos. 5 and 6 in defendant's motion, the government consents to make the key referred to therein available for inspection by defense counsel prior to trial at a time convenient to both sides and to inform the defendant of the time and ..."

The government did not consent to make the narcotics available to the defense as requested in the defendant's pre-trial motion. The court did not so order this which the defendant-appellant considers vital to his defense. Mr. Falley argues as per the article by Henry B. Rothblatt, Esq., in the April 26, 1974 New York Law Journal a copy of which is in the appendix hereto, that the narcotics in this case which the governemnt informant was certain had come from Nepal or Northern India is not illegal. Such is not prohibited by statute according to the article. Extensive research into such fact may be necessary to be undertaken. The narcotics in this case may well have been Cannabis Ruderalis rather than Cannabus Sativa L as testified to at the trial. The article says most chemists are not aware of the fact that there are three distinct species of cannabis. Cannabis Indicia is sometimes prohibited and Cannabis Ruderalis is not generally prohibited. The article says the United States Code prohibits both Cannabis Sativa L and Cannabis Indicia. Chemically, the three species are indistinguishable. The appellant who tried his own case wanted expert study of the narcotics. From the location Stolzenberg indicated the narcotics came from, there is a likely chance that the narcotics in this case could be Cannabis Ruderalis, which

Mr. Rothblatt writes is not prohibited by Federal Law. The chemist who testified for the government did not know where the narcotics came from, but the only evidence as to that fact which was given by the government informant may mean there has not been a crime committed.

Mr. FAlley also desired a private investigator to investigate his former friend, the government informer, David Solzenberg, to aid in cross-examination. He also asked to investigate other matters and was refused such request. The trial court's position was that under the Criminal Justice Act, Counsel could spend $150.00 without prior court order and thus could engage a detective. If greater expense was necessary further application could be made. However, in view of the cost of a detective and the extent of the investigation desired, none was hired because of the court's ruling.

The dismissal of the indictment by Magistrate Hartenstein as mentioned above without a hearing followed by the defendant-appellant's indictment was highly prejudicial. There was a deliberate effort by the government to deny

appellant a preliminary hearing. When defendant insisted on such hearing on November 16, 1973, the government asked for an adjournment until November 19, Monday, indicating there would be a hearing on that date. On November 19, the defense was informed in the morning that the hearing would be in the afternoon. While waiting around, the defense was informed that there would not be a hearing and the indictment would be dismissed. The defendant would be very quickly re-indicted. The United States Attorney who had the case left the Magistrate's area for other work in the afternoon and the case was dismissed. It is believed the government refused to agree to return of appellant's bail between the time of dismissal of the complaint and indictment. Thus, appellant even while there was a dismissal was still to some extent under a restraint. This fact together with the deliberate denial of a promised hearing should cause a reversal in this case. Such a hearing where the vital evidence would have been shown in advance to not have been in the government's possession to wit: the key, would have been important to the defense in its pre-trial procedures. Perhaps the trial court might have ruled differently if at that time without knowing more it had known the government

did not have possession of the key, which represents the tool of transfer of the narcotics. Such deliberate depriving to a defendant of a preliminary hearing should not be permitted or condoned by this court

POINT II

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED BECAUSE OF DENIAL OF MATERIAL PRODUCEABLE UNDER "JENCKS" AND SECTION 3500 U.S. CODE.

The government informant, David Stolzenberg testified to having worked with government agents for about 100 hours in various cases. He testified before several Grand Juries. It is believed that much of the material concerning interviews with the informant during his many hours of questioning should have been produced for use by the defense. This is especially so where as here the entire government case rests on the testimony of the informer. There must have been reports by agents concerning the reliability of facts given by David Stolzenberg and as to what help he expected the government to be to him. The witness, Stolzenberg stated he was still using narcotics at the time of the trial. If he was spending so much time with government agents there

presumably are reports of statements by Stolzenberg and conversations with him. Such information would have made it easier to further discredit the witness.

Denial of reports available pursuant to Section 3500, United States Code and Brady v. Maryland 373 U.S. 83(1963), is reversible error in the Second Circuit. Recently in United States v. Pacelli, Jr., No. 368-September Term, 1973 on page 1347, decided on January 11, 1974, this court held denial of such material to be reversible error. While no particular letter or paper withheld is pointed to, it is argued that based on the extensive relations of the informant with the government whose procedures are known to this court that various reports must have been made. Material about matters concerning David Stolzenberg would have aided cross-examination of the witness.

POINT III

DENIAL OF A REQUESTED PRE-TRIAL HEARING AS TO THE ADMISSIBILITY OF WIRETAPS SHOULD HAVE BEEN GRANTED AS SHOULD A REQUESTED PRE-TRIAL HEARING AS TO THE ACCURACY OF TAPE RECORDINGS IN VIEW OF LAPSES.

It is contended that pursuant to the Omnibus Crime Control Act, the Federal Communications Act and interpretations

by the courts that consential wiretaping where the other party to the conversation does not consent is prejudicial and not admissible in evidence. Recent court decisions leave the question open as to whether the majority of the Justices of the Supreme Court presently believe such taping without a warrant to be permissible. It is argued here that such recording is not permissible.

In this case where there was testimony as to gaps in the recording and testimony of the microphone falling off the telephone, there should have been a hearing as to the authenticity and accuracy of what was played and transcribed The tapes should have been made available to the defense ten days before trial as had been directed by Judge Frankel, rather than on the eve of trial.

POINT IV

DENIAL OF DEFENDENT'S MOTION FOR AN ADJOURNMENT BEFORE THE START OF THE TRIAL TO PERMIT PRIVATELY RETAINED COUNSEL TO APPEAR WAS A DENIAL OF APPELLANT'S RIGHT TO COUNSEL

The denial of the defendant's motion to adjourn the trial to permit counsel of his choice, Judge Rafael Koenig, to appear was a denial to Mr. Falley of counsel of his

his choice. The constitutional right to counsel is one of the great privileges under our Constitution. The calendars and efficient functioning of courts are also important. In the situation which arose in this case, a balancing of the two should have permitted adjournment of the case so Mr. Falley could have Judge Koenig as his lawyer. The trial court has long calendars and presumably many litigants, civil and criminal, anxious for their day in court. The adjournment request was made about a week before trial by the last day permitted by the trial court for motions. The witnesses were all government agents except for Stolzenberg who was devoting himself to activity with the Government. Adjournment would not have been the cause of loss of witnesses or inconvenience to witnesses. If the court below had been able to substitute another case the brief adjournment of the Falley case would not have harmed anyone and would have permitted the defendant appellant to have a lawyer he had engaged and wanted. On the date of sentence when appellant was informed he had to surrender on the following Monday, he asked assigned counsel to make a bail motion before the Court of Appeals. At that time when the dates of briefs and hearing were set it was believed appellant would be at

liberty rather than incarcerated. When private counsel, Irving Anolik, Esq., was engaged, counsel believed he would become the attorney of record on this appeal. However, as he has filed a brief as an amicus curiae it is requested that such brief be given full consideration by the court. It is to be pointed out that the situation at this court is quite different from that which existed at the trial court. The appellant's fundamental right to counsel of his choice at his trial was the issue there. Counsel, seeking the adjournment, had other engagements whereas counsel, seeking the extension in this court, requested it in order to give the case detailed evaluation. He has, however, been able to submit a brief and render his services to the appellant in this court.

POINT V

THE EVIDENCE PRESENTED AT THE TRIAL WAS INSUFFICIENT TO WARRANT A VERDICT OF GUILTY

The alleged transfer of the key to a locker in Grand Central Station by the appellant to the informant was witnessed only by the informant. The key could have come from David Stolzenberg's boots, which were not searched by

Government agents before his meeting with the appellant. Stolzenberg, with the record of prior convictions and awaiting sentence, is not a creditable witness. It may be true that the jury was able to listen to the testimony of the informant David Stolzenberg and make a judgment. But the court is asked as a matter of law to consider such testimony of an individual with his background to be incredible and insufficient. There were many narcotic agents in the vicinity but none saw Falley pass the key Stolzenberg testified about. There were no other witnesses to Mr. Falley's possession in any way of narcotics. Even the recorded conversation is not clear or conclusive. David Stolzenberg admitted that at the time of trial he was still using narcotics. Such drugs together with his epileptic history and his history of lapses of memory should make his testimony insufficient as a matter of law to convict the appellant.

The one telephone conversation of the four had between appellant and informant that was recorded certainly is not clear cut evidence of the purchase and sale of hashish. The jury, having been told of the other conversations by Solzenberg and then hearing this one together with the

extensive gaps mentioned above, might well have misinterpreted the evidence.

The attempt to bolster the recorded conversation by explaining the absence of any reference to the word hashish in such recording was highly prejudicial and erroneous. The Government was allowed to inquire of witnesses about whether such word is usually used in their conversations about narcotics. They were asking about other transactions not charged in this indictment and were trying to prove by the absence of mention of hasish that something illegal was going on. This is certainly confusing and wrong.

The nonproduction of the key to the locker where the narcotics were stored which the Government had indicated it had possession of prior to trial should be enough to reverse this conviction. The testimony of Stolzenberg to the transfer of the key when there is no key in evidence should be viewed with skepticism. As discussed above, another insufficiency was the failure to produce the narcotics for examination as requested. The many insufficiencies in this case should, when grouped together, be deemed as prejudicial and result in reversal.

POINT VI

APPELLANT HEREWITH ADOPTS AND INCORPORATES BY REFERENCE ALL ARGUMENTS IN THE BRIEF OF RETAINED COUNSEL FILED ON BEHALF OF APPELLANT AS AN AMICUS CURIAE.

Retained counsel has prepared and submitted his brief. Such brief is adopted by counsel of record for the appellant. It is hoped the court will incorporate the brief by the counsel appellant has engaged and permit such counsel to argue this matter before the court.

CONCLUSION

FOR THE ABOVE REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED; IN THE ALTERNATIVE APPELLANT SHOULD RECEIVE A NEW TRIAL.

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